

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 11

AVANTE AT WILSON, INC.
Employer¹

and

Cases Nos. 11-RC-6495
11-RC-6496

UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL 204, A/W UNITED FOOD AND
COMMERCIAL WORKERS INTERNATIONAL
UNION, AFL-CIO, CLC
Petitioner²

DECISION AND ORDER

The Employer, Avante at Wilson, Inc., a North Carolina corporation, operates a nursing home in Wilson, North Carolina, where it is engaged in providing residential nursing, housekeeping, and dietary services to its clients. The Employer and the Petitioner, United Food and Commercial Workers Union, Local 204, a/w United Food and Commercial Workers International Union, AFL-CIO, CLC, are now parties to a collective-bargaining agreement for a unit comprised of all full-time and regular part-time nursing assistants, orderlies, cooks, dietary employees, maintenance employees, ward clerks and central supply clerks, housekeeping and laundry employees and restorative nurses aides at the Employer's Wilson, North Carolina facility. The contract is effective from November 1, 2001 through October 31, 2004.

¹ The Employer's name appears as amended at hearing.

² The Petitioner's name appears as amended at hearing.

The Petitioner has filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act in Case No. 11-RC-6495 seeking to represent a unit of all full-time and part-time licensed practical nurses at the Employer's Wilson, North Carolina facility. Petitioner has also filed a petition in Case No. 11-RC-6496 seeking to represent a unit of all full-time and part-time registered nurses employed at the same facility. A hearing officer of the Board held a hearing and the parties filed briefs with me.

The parties agree and the record demonstrates that the licensed practical nurses and registered nurses all work in the position of staff nurse and, for all purposes relevant herein, their duties are indistinguishable. As evidenced at the hearing and in the briefs, the sole issue in this matter is the supervisory status of staff nurses. The Petitioner contends that staff nurses are not supervisors, whereas the Employer contends that they are supervisors, and that the petitions should be dismissed. The unit sought by the Petitioner in Case No. 11-RC-6495 has approximately 11 employees and the unit sought in Case No. 11-RC-6496 has approximately eight employees.

I have considered the evidence and the arguments presented by the parties in regard to the supervisory status of staff nurses. As discussed below, I have concluded that staff nurses possess the authority to discipline employees and to adjust grievances, and are, therefore, supervisors under Section 2(11) of the Act. I shall, therefore, dismiss the petitions. To provide a context for my discussion of this issue, I will first provide an overview of the Employer's operations. Then, I will present in detail the facts and reasoning that support my conclusion.

I. OVERVIEW OF OPERATIONS

The Employer operates a 110-bed nursing home facility that is routinely at full capacity. In charge of the operation is an Administrator to whom a number of departments heads or directors report. The Director of Nursing (DON) is the department head with overall responsibility for the staff nurses at issue. Below the DON are nurses holding the position of Assistant Director of Nursing (ADON), Weekend Supervisor and Unit Manager. At hearing, the parties stipulated that nurses holding those positions are supervisors.

The Employer houses its patients on two wings denoted “A” and “B” and on a hallway connecting the two wings, which is referred to as the cross-hall. The A and B wings are further subdivided into halls called “A front and back,” and “B front and back.” Staff nurses work 12-hour shifts, either 7:00 AM to 7:00 PM or 7:00 PM to 7:00AM. On the day shift, one staff nurse is assigned to each hallway location. On the night shift, one staff nurse is assigned to each wing, and one staff nurse, also called a lead nurse, is assigned to the cross hallway.³ Staff nurses spend approximately 50% of their working time providing direct patient care to from 20 to 26 patients. Specifically, staff nurses check each of their assigned patients every two hours, medicate patients at least three times per shift and treat their patients’ wounds, if necessary. The rest of a staff nurse’s time is spent dealing with family members, with certified nursing assistants (CNAs) and in completing paperwork.

³ “Lead Nurses” who work the night shift, earn \$.50 more per hour than other staff nurses. Because they are assigned to the cross-hall, they have a lighter patient load than the wing nurses do. To make up for this disparity in patient load, the lead nurse makes one round on each of the wings. Other than that, there is no evidence in the record that lead nurses have any other duties that are distinguishable from the duties of other staff nurses.

CNAs, who are in the bargaining unit governed by the collective-bargaining agreement referred to above, work eight hour shifts from 7:00 AM to 3:00 PM; 3:00 PM to 11:00 PM and 11:00 PM to 7:00 AM. Generally, 12 CNAs are assigned to work from 7:00 AM to 3:00 PM; eight CNAs are assigned to work from 3:00 PM to 11:00 PM; and seven CNAs are assigned to work from 11:00 PM to 7:00 AM. Some CNAs have permanent assignments and routinely care for patients in one hallway in specific rooms, while other CNAs are designated as floaters. CNAs spend 90% of their working time bathing, grooming, feeding, transporting and taking the vital signs of patients. A staff nurse has no authority to change any given CNA's permanent assignment, although she may change a CNA's assignment during a given shift in response to staffing or patient needs.

On weekdays, the DON, ADON and one of the Unit Managers are routinely present in the facility until 5:00 PM. During weekends, a Weekend Supervisor is present from 7:00 AM to 7:00 PM. Thus, none of the stipulated statutory supervisors are routinely present in the facility from 5:00 PM to 7:00 AM during weekdays and from 7:00 PM to 7:00 AM during weekends. However, there is always an on-call nurse, drawn from the ranks of department heads and the stipulated supervisors, available to the staff nurse for consultation regarding staffing or other problems by cellphone or beeper. Also, the DON is available by cellphone or beeper at all times.

II. STATUS OF STAFF NURSES

Before examining the specific duties and authority of staff nurses, I will briefly review the requirements for establishing supervisory status. Section 2(11) of the Act defines the term supervisor as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or

responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” To meet this definition, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. Ohio Power Co. v. NLRB, 176 F. 2d 385 (6th Cir.), cert. denied 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. Harborside Healthcare, Inc., 330 NLRB 1334 (2000). The burden of proving supervisory status lies with the party asserting that such status exists. Kentucky River Community Care, Inc., 532 U.S. 706, 711-712 (2001). Lack of evidence is construed against the party asserting supervisory status. Michigan Masonic Home, 332 NLRB No. 150, slip. op. at 1 (2000). Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status even if this authority has not yet been exercised. See, e.g., Pepsi-Cola Co., 327 NLRB 1062, 1063 (1999); Fred Meyer Alaska, Inc., 334 NLRB No. 94, slip. op. at 4 n. 8 (2001). However, the absence of evidence that such authority has been exercised may be probative of whether such authority exists. See Michigan Masonic Home, supra, slip. op. at 3; Chevron U.S.A., 308 NLRB 59, 61 (1992).

With regard to whether the staff nurses possess any of the 12 criteria listed in Section 2(11), the parties stipulated that the staff nurses do not have the authority to hire, promote, lay off, recall or discharge employees. The Employer asserts, however, that staff nurses have the authority to assign, discipline, and responsibly direct CNAs and to adjust their grievances. In addition, the Employer asserts that staff nurses have the authority to reward CNAs by providing input into CNA evaluations that may affect whether a probationary CAN is hired as a permanent

employee. Accordingly, I will discuss the authority of the staff nurse in assignments, responsible direction, discipline, adjustment of grievances, and rewarding of CNAs.

A. Assignments

A night shift staff nurse regularly completes daily assignment sheets for CNAs. That night shift nurse knows little or nothing about the individual capabilities of many of the CNAs, whose names she is placing on the assignment sheet. Rather, using little or no independent judgment, the night shift nurse completes the daily assignment sheets using source documents that the Staff Coordinator supplies to her, including a daily schedule and listings of CNAs that identify them as having permanent room assignments or as “floaters.” The normal number of CNAs to be assigned to each shift is prescribed. Adjustments to the schedule are frequently needed when a CNA is absent. The DON testified that in this circumstance, a staff nurse must adjust the schedule using her knowledge of each patient’s needs and the capabilities of each available CNA.

The DON further testified that CNAs sometimes need help in completing their assignments due to unexpected contingencies. In that event, the CNA reports to her staff nurse, who in turn assigns another CNA to help, or herself helps the CNA to complete her tasks. According to the DON, staff nurses can change a CNA’s assignment in response to a patient or family complaint, but the DON noted that she has veto power over such a re-assignment.

CNAs have assigned breaks. The DON testified that these break assignments are used solely as a guideline because work assignments regularly interfere with assigned breaks.

Consequently, staff nurses frequently reschedule CNA breaks to insure that breaks are equitably distributed.

In marked contrast to the DON's testimony concerning the assignment schedule, a staff nurse, who had formerly held the positions of Unit Manager, ADON and Weekend Supervisor, testified that she never takes into account factors of patient need or the individual capabilities of CNA's in making adjustments to the schedule. In her experience, whenever fewer than 12 CNAs are available on a given workday, she merely transfers the names of the available CNAs from the 12-CNA schedule form to a schedule form for 11 or fewer CNAs. In so doing, she follows the permanent assignment sheet as closely as possible, perhaps adding one room to each available CNA's assignment. In fact, the staff nurse said that she had routinely met with all the available CNAs prior to readjusting the schedule to request their input into the distribution of assignments.

The staff nurse testified that whenever it is necessary for a CNA to work overtime to make up for a nursing shortage, she first seeks volunteers. If there are no volunteers, she assigns a CNA to work four hours of overtime, in accord with the established work schedule, which contains a dot placed beside the name of one of the assigned CNA on each shift. The parties refer to this CNA as the "dotted CNA." The dotted CNA must work four hours overtime, if needed. However, the DON or a Unit Manager must approve any overtime work that is scheduled.

If the need arose for an additional CNA for any given shift, because, for example, the number of CNAs was below the number required by the State licensing authority, a staff nurse could not take it upon herself to call employees in or to call a temporary agency. Instead, the staff nurse must consult the on-call nurse regarding such a shortage of personnel. Only if the on-

call nurse authorizes extra help would the staff nurse telephone CNAs using prepared listings. In this regard, staff nurses have no authority to compel a CNA to come to work.

Staff nurses have no authority to grant time off. In an emergency situation requiring a CNA to leave early, a staff nurse has no authority to keep the CNA from leaving. If the CNA's absence were to be of significant duration, the staff nurse would adjust CNA assignments, as outlined above for CNA absences.

Based primarily upon the testimony of the DON, the Employer argues that staff nurses regularly utilize their discretion and independent judgment in assigning and directing all aspects of a CNA's work activities. However, the testimony of the staff nurse contradicts that of the DON. Thus, the record is inconclusive in regard to the degree of independent judgment actually exercised by staff nurses in making and adjusting CNA assignments. That is, although the DON testified that staff nurses base their decisions regarding assignments on their perceptions of patient need and CNA capability, the staff nurse testified that she never takes either patient need or CNA capability into account, and that she merely adjusts assignments to evenly distribute work. Further, the record is clear that staff nurses follow established practices and policies of the Employer in making and adjusting CNA assignments, and do not determine staffing patterns or ratios. Accordingly, I find that the Employer has not met its burden to demonstrate that staff nurses exercise independent judgment while completing daily assignment sheets and/or in adjusting daily CNA assignments.

B. Responsible Direction

Staff nurses routinely monitor the performance of CNAs and immediately correct any problems that they observe as the CNA performs the tasks of bathing, grooming, feeding, transporting and taking the vital signs of patients. The methods by which the CNAs are to

perform their specific duties are contained in detailed policies, procedures, and protocols maintained by the Employer. A staff nurse who observes that a CNA is not properly performing a given procedure can immediately instruct that CNA regarding the proper procedure or method to use. Thereafter, the staff nurse completes a training form, stating that she has provided that particular CNA with specific in-service training. Petitioner's witness, the Union's Chief Steward, testified that a staff nurse had recently subjected her to such an "in-service."

Staff nurses are also called upon to judge the competence of CNAs regarding specific procedures. In that regard, the Union's Chief Steward testified that during the past six months, the DON provided all CNAs with training concerning the bathing of patients and incontinence. After completing that training, each CNA was required to bathe a patient in the presence of a staff nurse who judged whether the CNA had demonstrated competence in doing so. However, the record is silent as to whether any CNA failed the test and if so, what action was taken.

Petitioner contends that whenever a staff nurse directs a CNA to perform a specific task, she does so in a routine or clerical manner and does not exercise sufficient independent judgment to be deemed to be a supervisor because, generally, staff nurses merely ask a CNA to perform a given task that are part of the CNA's daily duties, for which duties she has been educated, licensed, trained and hired to perform. Even in an emergency situation, generally a staff nurse simply will ask a CNA to perform her routine duties out of typical order or on an expedited basis. Thus, the Petitioner quotes Kentucky River Community Care, Inc., supra at 713-14, in which, citing Chevron Shipping Co., 317 NLRB 379, 381 (1995), the Supreme Court stated that "it is also undeniably true that the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer." Petitioner further argues, citing United States v. Nordic

Village, Inc., 112 S. Ct. 1011, 1015 (1992), that a staff nurse, in monitoring a CNA to ensure proper performance of her duty, is not engaging in responsible direction because she is simply performing a checking function that involves little discretion.

With regard to responsible direction, the Supreme Court recently held that the judgment used by registered nurses when directing less-skilled employees to deliver services in accord with employer-specified standards cannot automatically be precluded from the definition of independent judgment simply because this judgment is “professional or technical.” Kentucky River Community Care, Inc., 532 U.S. at 706. The Court acknowledged, however, that when an employee assigns or directs work based on orders or regulations issued by the employer, the degree of that individual’s judgment may be circumscribed to such an extent that it falls below the statutory threshold for a finding of supervisory status. Id. at 713. The Court also suggested that responsible direction can be defined as the direction of employees as distinguished from the mere direction of tasks, citing Providence Hospital, 320 NLRB 717(1996) as an example. Id. at 720.

In a decision post-dating Kentucky River Community Care, Inc., the Board has found that LPNs engaged in many of the same work activities as the staff nurses here were using “routine” authority that did not reflect independent judgment. Beverly Health and Rehabilitation Services, Inc., 335 NLRB No. 54, slip op. at 1-2, n. 3. (2001).

I conclude that the Employer has not met its burden of establishing that staff nurses use independent judgment in their directing the work of CNAs. The direction of the staff nurses is strictly circumscribed by the application of the Employer’s detailed procedures and protocols. In addition, the record makes clear that staff nurses direct CNAs in the performance of discrete tasks, rather than directing their work in general. Finally, the direction reflects a “routine”

authority, such that the record does not establish that staff nurses exercise a sufficient quantum of independent judgment to meet this statutory criteria.

C .Discipline

A unit manager, who had held various positions including staff nurse, ADON and DON, testified that a CNA would be guilty of insubordination if she were to fail to heed the direction of a staff nurse. The unit manager further testified that the Employer tells CNAs throughout their employment, including during in-service training, that they are required to follow the instructions of staff nurses. In the context of testifying about discipline for insubordination, the unit manager further testified that, although a staff nurse did not have the authority to issue a formal written suspension, she did have the authority to send a CNA home for refusing to carry out work assignments, without getting prior approval from a higher level manager. Citing no specific examples, the unit manager stated that she knew that staff nurses had sent CNAs home for refusing to carry out work assignments.

In addition, the unit manager stated that other discipline of a CNA might begin with a staff nurse's report to the DON or to a unit manager stating that the CNA did not complete her duties on time or had failed to timely perform a procedure that the staff nurse ordered her to perform. Thereafter, however, the staff nurse would have no further input in the decision process.

Based on the foregoing, I find that the record contains sufficient evidence to establish that staff nurses possess the authority to discipline CNAs and that they exercise independent judgment when they impose that discipline. This conclusion requires analysis, in the first instance, of whether the act of sending someone home constitutes discipline, as well as whether

the circumstances under which the staff nurse is authorized to send a CNA home reflect the use of independent judgment.

I find that the authority to send an employee home as a consequence of that employee's refusal to carry out a work assignment reasonably constitutes the authority to discipline employees, despite whether that action constitutes a formal suspension under a disciplinary procedure. Cf. Leisure Chateau Care Center, 330 NLRB No. 127 (2000) (in finding LPN and RN charge nurses not to be supervisors, Board distinguishes facts relied upon by the Third Circuit in Passavant Retirement and Health Center v. NLRB, 149 F.3d 243 (3d Cir. 1998), denying enf. 323 NLRB No. 99 (1997); Board notes that nurses in Passavant had the disciplinary authority to send aides home for flagrant misconduct and had the authority to resolve minor problems and gripes). The authority to impose the consequence of separation from employment, even for the balance of one day, logically serves a disciplinary function when it is imposed for a refusal to carry out a work assignment.

In regard to independent judgment, the Board has held that when a staff nurse is authorized to send an aide home only when the aide has engaged in flagrant misconduct, the staff nurse is not exercising independent judgment in making that decision. See, e.g., Northcrest Nursing Home, 313 NLRB 491, 497-98 (1974), quoted in Passavant Retirement and Health Center, 149 F. 3d at 248. See also Board of Social Ministry d/b/a Green Acres Country Care Center, 327 NLRB 257 (1998). This rationale is predicated on the theory that the decision to send an aide home in those circumstances simply constitutes an automatic consequence for particularly bad behavior. In the present case, however, the record establishes that staff nurses are empowered to send a CNA home for refusing to carry out any given assignment. Thus, the discretion of the staff nurse is not limited by a requirement that the offending conduct must be

flagrant or involve patient abuse before a staff nurse is authorized to send a CNA home. The present case, then, does not come within the Board's rationale concerning the impact of a limitation on the charge nurse's discretion in deciding to send a CNA home.

I find that the record supports the conclusion that staff nurses exercise the supervisory authority to discipline CNAs when they send them home for refusing to carry out a work assignment, and that the decision to do so is informed by the use of independent judgment.

D. Adjustment of Grievances

The record establishes that staff nurses possess the authority to adjust grievances, both through documentary evidence and testimony. The cornerstone of the documentary evidence is the collective-bargaining agreement covering the CNAs. A provision of this contract specifically provides that employees may present certain complaints or problems to their immediate supervisor for adjustment. The Union's Chief Steward, a CNA, confirmed that she understood that the "immediate supervisor" of CNAs would be the staff nurse. This understanding is buttressed by the job descriptions of RN and LPN staff nurses, which provide that they supervise CNAs. In addition, the job description of the RN staff nurse specifically provides that he or she is to serve as the "facility's representative during the first step of the facility's problem-solving procedure." Because staff nurses are the immediate supervisors of CNAs, then, they have the authority under the Employer's formal complaint procedure to adjust grievances or problems of CNA's.⁴ This conclusion is further buttressed by the testimony of the unit manager, who testified that when she was a staff nurse, she personally had resolved disputes between CNAs.

⁴ Although job title and the perception of supervisory status often function as secondary indicia of supervisory status, here those factors also serve to actually identify the role of staff nurses in an ongoing process of the facility, that is, the grievance adjustment procedure.

The Petitioner contends on brief that staff nurses have no supervisory authority to adjust grievances, although they “may try to informally resolve disagreements.” Further, the Petitioner apparently argues that the Employer has not met its burden to prove that staff nurses have the authority to adjust grievances. In support of this argument, the Petitioner cites Audubon Regional Medical Center, 331 NLRB No. 42, slip. op. at 75 (June 22, 2000) for the proposition that the Board has found proof of supervisory authority insufficient when there is reliance on job descriptions rather than the actual duties performed. The Petitioner also relies on Northern Montana Health Center, 324 NLRB 752, 754 (1997) for the proposition that summary assertions that employees have supervisory authority without providing specific examples of the exercise of such authority is insufficient to prove supervisory status.

I find the foregoing cases to be inapposite to the analysis here. As an initial matter, the reference to Audubon Regional Medical is misplaced, as the cited section simply contains the ALJ’s recital of a party’s position in that case, a position predicated upon an earlier decision of the Board in Sunset Nursing Homes, 224 NLRB 1271 (1976). In that latter case, the Board closely analyzed the facts when a job description provided that LPNs had the authority to make “effective recommendations” concerning a variety of matters, including hiring, discharges, suspensions, promotions, layoff, transfers, pay increases, and vacancies. The date of origin of the job description was questionable, and the Board noted that “oddly enough, the job description did not mention what would be considered the LPN’s normal duties” related to patient care. Id. at 1272. Even with its apparent concern about the bona fides of the documentary evidence, the Board, nevertheless, found that the case presented a close issue when it concluded that the job description simply was not dispositive of the supervisory determination. Id.

In the present case, by contrast, the documentary evidence includes both the parties' collective-bargaining agreement and the employee handbook, as well as job descriptions that contain specific outlines of a full range of duties. The testimony includes that of the Petitioner's own witness and Chief Steward, who confirmed that staff nurses serve as the immediate supervisors of CNAs on the floor. For these reasons, the Board's holding in Sunset Nursing Homes does not compel a conclusion that the staff nurses here are not supervisors. Similarly, the present case is distinguishable on the same grounds from Northern Montana Nursing Home, as the record evidence here contains both documentary and testimonial evidence concerning the actual authority and role of staff nurses in adjusting grievances as participants in the Employer's grievance or complaint adjustment procedure.

Finally, the foregoing conclusion is not undermined by the testimony of Petitioner's witness, a staff nurse, who stated that she had never adjusted any grievances. To establish the existence of supervisory authority, it is not necessary that all individuals in the disputed classification have exercised their actual authority. Pepsi-Cola Co., 327 NLRB 1062, 1063 (1999).

Based on the foregoing, I find that the Employer has met its burden in establishing that staff nurses possess the authority to adjust grievances and that the record amply supports the finding of supervisory status under Section 2(11) based on this statutory indicium.

E. Reward

The Employer contends that by providing input into the evaluations of newly-hired CNAs, staff nurses possess the authority to reward employees. As the Board has observed, because Section 2(11) does not include "evaluate" in the enumerated statutory indicia, it is only when an evaluation affects the wages or job status of an employee that the individual performing

the evaluation will be found to be a supervisor. Harborside Healthcare, 330 NLRB at 1334. I find that the record does not support a conclusion that the role of staff nurses regarding CNA evaluations affects the wages or job status of CNAs.

The record establishes that the Employer regularly evaluates the performance of all CNAs. A unit manager may solicit input into the evaluation of a specific CNA from a staff nurse. In so doing, the unit manager might ask the staff nurse to evaluate the CNA's quality of work, quantity of work, job knowledge and mechanical ability. When thus consulted, staff nurses complete no written documents or otherwise participate in the CNA's evaluation, nor do they have access to the CNA's personnel file.

CNA evaluations have no effect upon wages because all CNAs receive similar wage increases, as mandated by the collective-bargaining agreement negotiated by the parties. The Employer, asserts, however, that evaluations do affect job status. In that regard, the Employer asserts that because probationary employees are not covered by the collective-bargaining agreement, a negative evaluation can lead to the dismissal of a probationary CNA. Using this logic, the Employer asserts that by giving positive information regarding a probationary CNA to her unit manager, a staff nurse would be rewarding that CNA with better wages and benefits. Conversely, by providing negative comments about the CNA, she would be causing her discharge.

The record contains only speculative and non-specific testimony concerning the foregoing evaluation process. That is, the record is silent concerning any specific instance in which a staff nurse has provided either positive or negative information to be included in the evaluation of a probationary CNA. Further, there is no evidence that the Employer ever discharged a CNA because a staff nurse had provided negative input into her evaluation.

Moreover, a staff nurse testified that she had never been asked to orally evaluate a CNA. The record evidence, therefore, is insufficient upon which to find that staff nurses possess the authority to reward CNAs. Harborside Healthcare, 330 NLRB at 1335.

F. Secondary Indicia.

It is settled that secondary indicia, including the individual's job title or designation as supervisor, as well as the perception of others that the individual is a supervisor, may be used in making supervisory determinations when evidence of primary indicia is present. See, e.g., Monarch Federal Savings and Loan Association, 237 NLRB 844 (1978) (secondary indicia may inform supervisory determination when evidence of primary indicia is present); Flex-Van Service Center, 228 NLRB 956 (1977) (same). Thus, the foregoing findings regarding the primary statutory indicia of authority to discipline and to adjust grievances are buttressed by the secondary indicia of job title, which is contained in the staff nurses' job description, as well as by the perception of both CNAs and management that staff nurses supervise CNAs.

Additional secondary support for the supervisory finding comes from the role of the staff nurses in adjusting CNA time records. CNAs routinely clock in and out, but in the event that a CNA fails to do so, a staff nurse corrects the timecard using an "E-time Correction/Adjustment Form," which she signs on a line denominated "Supervisor Signature."

III. CONCLUSION

The evidence does not sufficiently establish that staff nurses use independent judgment in making and adjusting CNA assignments and in directing the work of CNAs. Nor does the record establish that staff nurses have the authority to reward employees through the evaluation process. The record does establish, however, that staff nurses have the authority to discipline a CNA for insubordination by sending the CNA home upon a refusal to follow a direct order. The record

further establishes that, as the Employer's representative at the first step of the grievance procedure in dealing with a CNA's grievance or complaint, the staff nurse has the authority to adjust grievances. In addition, the conclusion that staff nurses possess Section 2(11) authority is buttressed by secondary indicia, including designation of staff nurses as supervisors and the perception that staff nurses supervise CNAs.

Accordingly, I find that the Employer, as the party asserting supervisory status, has met its burden to prove that the staff nurses possess statutory indicia of supervisory authority in the areas of discipline and adjustment of grievances. Therefore, I find that the staff nurses are supervisors as defined by Section 2(11) of the Act, and I shall dismiss the petitions.

IV. FINDINGS

Based on the entire record in this matter and in accord with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner claims to represent certain employees of the Employer.
4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act because the petitioned for LPNs and RNs, who work as staff nurses, are supervisors pursuant to Section 2(11) of the Act.

V. ORDER

IT IS HEREBY ORDERED that the petitions filed herein be, and they hereby are, dismissed.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Order may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **November 5, 2002**. The request may **not** be filed by facsimile.

Dated at Winston-Salem, North Carolina, on the 22nd day of October 2002.

/s/ Willie L. Clark, Jr.
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